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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-978

WILLIAM M. YOUNG and FAITH ADAMS YOUNG,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, WILLIAM M. and FAITH ADAMS YOUNG, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on September 24, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, is reported at 606 F.2d 143, and appears at Appendix A, *infra*, p. A-1.

The order and memorandum opinion of the Middle District of Tennessee, Nashville Division was entered on January 11, 1977, was not reported, and appears at Appendix B, *infra*, p. B-1.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

QUESTIONS PRESENTED

1. Whether the Tennessee Valley Authority has exceeded the authority given to it by Congress in the Tennessee Valley Authority Act of 1933 by constructing the Hartsville Nuclear Plant at a location outside the Tennessee Valley.

2. Whether the Court of Appeals, in upholding the Tennessee Valley Authority's position that it is authorized to construct electric generating plants outside the Tennessee Valley, improperly deferred to a congressionally created corporation's interpretation of its own scope of authority.

3. Whether the Court of Appeals, in holding that the Tennessee Valley Authority Act authorizes the Tennessee Valley Authority to construct electric generating plants outside the Tennessee Valley, ignored the central teaching of *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 57 L.Ed.2d 117, 98 S.Ct. 2279 (1978) that the appropriation of funds by Congress cannot serve to amend or repeal other Congressional enactments.

STATUTES INVOLVED

The statutes involved are set out in relevant portion in Appendix C, *infra*, p. C-1. These statutes are the following:
16 U.S.C.§ 831
16 U.S.C.§ 831c,(g), (i), (j)
16 U.S.C.§ 831k

STATEMENT OF THE CASE

This case began as a suit in the United States District Court for the Middle District of Tennessee, Nashville Division, by William and Faith Young against the Tennessee Valley Authority and certain individual defendants, for declaratory and injunctive relief to prevent the construction by the Tennessee Valley Authority (TVA) of four nuclear powered steam plants for producing electricity, known collectively as the Hartsville Nuclear Plant, at a site on the Cumberland River near Dixon Springs, Tennessee, outside the Tennessee Valley (i.e., outside the watershed of the Tennessee River). The plaintiffs alleged that they own an reside on a farm located approximately one mile from the proposed plants, and that they would be damaged by the construction of the plants.

Jurisdiction of the District Court was asserted under 5 U.S.C. §§701-706 and 28 U.S.C.§1331(a). The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

It is agreed by all parties that both the Cumberland River and the Tennessee River are tributaries of the Ohio River. The Cumberland River is not, and cannot be considered, a tributary of the Tennessee River.

Plaintiffs, petitioners here, sought relief on the grounds that authority to construct electric generating plants, or *power houses*, was granted to TVA, but was restricted to the Tennessee Valley and its tributaries, by section 4(j) of the Tennessee Valley Authority Act of 1933, as amended, which provides that the TVA:

> "...shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines."
>
> 16 U.S.C. § 831c(j).

The defendants moved, in the alternative, to dismiss the action on the ground that the amended complaint fails to state a claim on which relief can be granted, or for summary judgment dismissing the action on the ground that the amended complaint, together with an affidavit annexed to the motion, shows that

there is no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law.

The sole issue presented by TVA's motion is the legal question of whether the TVA has statutory authority to construct its electric generating plants outside the Tennessee River watershed.

The District Court, Judge L. Clure Morton, granted the motion to dismiss in accordance with a memorandum opinion concluding that, "it is the conclusion of this court that TVA has authority, under the TVA Act, to construct the Hartsville plant on the Cumberland River." Appendix B, *infra*. On plaintiffs' appeal from the order of dismissal, the Court of Appeals affirmed the District Court's dismissal, Judge Anthony Celebrezze dissenting. Petitioners seek review of thar decision.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT ISSUE OF STATUTORY CONSTRUCTION INVOLVING THE TERRITORIAL SCOPE OF THE TENNESSEE VALLEY AUTHORITY'S POWER TO CONSTRUCT ELECTRIC GENERATING PLANTS.

In 1933, Congress created TVA for three expressed purposes:

1. To maintain and operate the properties owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of national defense, and for agricultural and industrial development;
2. To improve navigation in the Tennessee River;
3. To control the destructive flood waters in the Tennessee and Mississippi River basins.

See 16 U.S.C. § 831.

TVA was envisioned as a federal model for the unified development of an interstate region, the Tennessee River Valley. At the time TVA was created, the system it acquired consisted of one dam at Muscle Shoals (in the Tennessee River) and one or two dams either in the planning or construction stages (see H.R. No. 130, 73 Cong. 1st Sess., at 8-9). The legislative history mentions future dams, but does not mention construction of other types or power generating facilities.

Nothing appears in the enabling Act which would authorize TVA to construct electric power stations outside of the Tennessee Valley region. Nonetheless, by gradual expansion over a period of some 29 years, the TVA has extended its construction program to include power production outside of the Tennessee River and its tributaries. TVA has withstood legal challenges to various of its claimed statutory powers, but this case is the first direct challenge to its claimed right to construct power plants outside the territory of the Tennessee Valley.

The District Court, in its opinion below, states:

> "While it is fair to assume that Congress intended some reasonable limit to the permissible geographic range of TVA's power plant operations, it does not appear that TVA has yet exceeded that limit."
>
> See Appendix B, *infra*,.

TVA has now embarked upon an ambitious power plant construction program outside the Tennessee Valley. Petitioners believe that the writ of certiorari is proper in this case because there is a serious question as to the limits of TVA's permissible geographic range which should be decided definitively *before* the planned construction is undertaken.

II. THE APPLICABLE STATUTORY LANGUAGE CONFERS NO AUTHORITY FOR THE TENNESSEE VALLEY AUTHORITY TO CONSTRUCT AND OPERATE AN ELECTRIC GENERATING PLANT OUTSIDE THE TENNESSEE VALLEY.

Circuit Judge Anthony Celebrezze stated in his dissenting opinion in the court below:

> "... I interpret the relevant statute, 16 U.S.C. § 831c(i) and (j), to limit the TVA's ability to condemn land for power houses to points along the Tennessee River and its tributaries. I believe this is the clear import of the statutory language and we should not stretch its meaning in this case."
>
> See Appendix A, p. A-12.

As a corporation created by Congress, TVA has only those powers conferred by the TVA Act, including, in section 4(g) of the Act:

"... such powers as may be necessary or appropriate for the exercise of the powers *herein specifically conferred* upon the Corporation."

16 U.S.C. § 831c(g) (Emphasis added).

Specific authorization to construct the Hartsville Nuclear Plant, if it exists, must be found in section 4(j) of the TVA Act. To put that section in proper context we quote both it and part of section 4(i), which grants the power to acquire real estate for specified purposes.

Sec.4. Except as otherwise specifically provided in this Act, the Corporation -

* * *

(i) *Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries,* and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable to the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act.....

(j) *Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries,* as in conjunction with Wilson Dam, and Norris, Wheeler and Pickwick Landing Dams now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive floodwaters in the Tennessee and Mississippi River drainage basins; *and shall have power to* acquire or *construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines*

16 U.S.C. § 831c(i), (j) (Emphasis added).

The question of statutory construction is whether the phrase "in the Tennessee River and its tributaries," where it appears the second time in section 4(j), modifies and thus restricts the location of only "incidental works" or whether it modifies and thus restricts the location of all the facilities named in the clause in which the limiting words appear. Petitioners contend that the

latter interpretation is correct, and this appears from a reading of the two subsections, (i) and (j).

In subsection (i) the phrase "along the Tennessee River, or any of its tributaries" should read to modify the words "dams," "reservoirs," "transmission lines," "power houses," "other structures," and "navigation projects," effecting a geographic limitation to the power of the TVA in acquiring real estate for the construction of such facilities.

Similarly, the phrase, "in the Tennessee River and its tributaries," appearing the first time in subsection (j) modifies both "dams" and "reservoirs;" and again at the end of the first sentence of subsection (j) the phrase "in the Tennessee River and its tributaries" modifies "power houses," "power structures," "transmission lines," "navigation projects," and "incidental works." It is important to note that while the language above restricts transmission lines to "in the Tennessee River and its tributaries" that language is followed by the clause which allows the TVA to "unite the various power installations into one or more systems by transmission lines."

Thus, while dams, reservoirs, power houses, power structures, navigation projects, and incidental works are restricted to "in the Tennessee River and its tributaries," transmission lines may run anywhere necessary to unite the system. This authorization for transmission lines is reinforced by section 12 of the Act wherein TVA is "expressly authorized... to construct, lease, purchase, or authorize the construction of... transmission lines within transmission distances from the place where generated, and to interconnect with other systems." (16 U.S.C. § 831k)

Nowhere does there appear an analogous authorization for construction of power houses beyond the Tennessee River and its tributaries.

The view held by TVA is that the phrase in section 4(i) of the Act "along the Tennessee River, or any of its tributaries" modifies only "navigation projects," and that the phrase in section 4(j) "in the Tennessee River and its tributaries" (the second time it appears) modifies only "incidental works," rather than (in the view of the petitioners) that in both sections, the quoted prepositional phrases modify all of the facilities listed. An

inconsistancy of the TVA view appears because "navigational projects" is listed in both sections. Yet as the Court of Appeals noted, "(t)he parties agree that the TVA can build dams and navigation projects *only on the Tennessee River or on one of its tributaries.*" Appendix A, p. A-4 (Emphasis supplied).

Moreover, it would be inconsistant to assert that the power to *acquire real estate* (§ 4(i)) for the construction of dams and reservoirs *is not* subject to the geographical limitations if the power to *construct* dams and reservoirs (§ 4(j)) *is* subject to the geographical limitation.

If the geographical limitation applies to dams, reservoirs, and navigational projects, it applies to power houses, and this is consistent with the petitioners' reading of the sections.

The clear import of the two sections, when read together, is that Congress, in furtherance of the purposes for which the Tennessee Valley Authority was created, authorized TVA to acquire real estate for the power houses and to construct such facilities, but limited to the Tennessee Valley.

III. THE COURT OF APPEALS HAS MISAPPLIED THE DOCTRINE OF JUDICIAL DEFERENCE TO THE INTERPRETATION GIVEN TO A STATUTE BY THE AGENCY CHARGED WITH ITS ADMINISTRATION, DEFERRING TO THE TENNESSEE VALLEY AUTHORITY'S INTERPRETATION OF ITS OWN SCOPE OF AUTHORITY UNDER THE TVA ACT.

The Sixth Circuit's opinion in this case states:

> "We believe that the construction of the statute by TVA should be given great weight because of the frequent consistency and longevity of its construction, and the reliance placed thereon by the agency since at least the early 50's.
>
> Appendix A, at p. A-6

This application of the oft-applied doctrine giving deference or great weight to the interpretation given to a statute by the government officers or agency charged with its administration, in the circumstances of this case, provides the TVA an unwarranted and dangerous license to expand its powers beyond the scope authorized by Congress.

This Court has recognized that "[t]he power of an

administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz,* 415 U.S. 199, 231, 94 S.Ct. 1055, 39 L. Ed. 2d 270 (1974). However, the weight to be given to an administrative construction of an Act of Congress depends upon the presence or absence of one or more among several well established circumstances relating to the administrative construction.

First, of course, if the statute is not ambiguous, the deference principle is not applicable. *United States v. Southern Ute Tribe,* 402 U.S. 159, 91 S.Ct. 1336, 28 L.Ed.2d 695 (1971). Even conceding, arguendo, ambiguity in section 4 (j) of the TVA Act, other circumstances justifying application of the doctrine are not here present.

Deference to an administrative construction of a statute is most justified when that construction is enunciated in rulemaking or adjudicatory processes where adverse parties and public participation are available to assist the agency in ventilating the issue; or where an agency has been delegated authority to interpret the statute. See, for example, *Morton v. Ruiz, supra,* where this Court emphasized both the delegation of authority and the procedural safeguards:

> "In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA. This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 36 L.Ed 2d 620, 93 S.Ct 1773 (1973); *Dixon v. United States,* 381 U.S. 68, 74, 1 L Ed 2d 223, 85 S Ct 1301 (1965); *Brannon v. Stark*, 342 U.S. 451, 96 L Ed 497, 72 S Ct 433 (1952), but also to employ procedures that conform to the law. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 7590, 764, 22 L.Ed 2d 709, 89 S Ct 1426 (1969) (plurality opinion). No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds.
>
> "The Administrative Procedure Act was adopted to

provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations. See generally S. Rep No. 752, 79th Cong, 1st Sess, 12-13 (1945); HR Rep No. 1980, 79th Cong, 2d Sess, 21-23 (1946). That Act states in pertinent part: 'Each Agency shall separately state and currently publish in the Federal Register for the guidance of the public...
(D) substantive rules of general applicability formulated and adopted by the agency.' 5 USC § 552(a)(1)."
415 U.S. 199, 231-233 (footnotes omitted).

Great weight may be given to the interpretation by a regulatory agency of a statute which the agency is authorized to enforce, but those interpretations do not foreclose judicial review, and especially so when the issue involves the extent of the agency's jurisdiction or power. See *United States v. Missouri P.R. Co.* 278 U.S. 269, 49 S.Ct 133, 73 L.Ed 322 (1929) (Interstate Commerce Commission's asserted power denied); *Investment Co. Institute v. Camp* 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed 2d 367 (1971) (invalidating a regulation of the Comptroller of the Currency); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973) (invalidating Federal Maritime Commission's approval of a proposed agreement between carriers); *United States v. Cartwright*, 411 U.S. 546, 93 S. Ct. 1713, 36 L.Ed 2d 528 (reviewing and invalidating a treasury regulation).

The Tennessee Valley Authority has not been delegated any rulemaking, enforcement, or regulatory authority. In the absence of such delegated authority, the statutory interpretation made by an administrative agency is entitled to less weight, *General Electric Co. v. Gilbert* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). The weight to which it is entitled varies according to such factors as the timing and consistency of the agency's position and the degree of its expertise, *Batterton v. Francis*, 432 U.S. 416, 97 S. Ct. 2399, 53 L. Ed. 2d 448 (1977), its thoroughness, the validity of its reasoning, and its consistency, *General Electric Co. v. Gilbert, supra.* A construction contemporaneous with the enactment of the statute weighs in favor of the administrative

construction, *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed 2d 616 (1965).

Against these tests, how does TVA's opinion of its statutory authority under section 4(j) of the TVA Act measure up? The best that can be said is that TVA has been consistent (since the 1950's) in claiming the right to construct generating plants outside the Tennessee Valley, (but not contemporaneous with enactment of the Act). It has no authority to interpret its own scope of powers, beyond that of any corporation to make an internal decision on what actions might be ultra vires, and this is the apparent process by which it arrived at its interpretation. It does claim (erroneously, in petitioners' view) that Congress has impliedly approved its interpretation, notwithstanding that this would amount to an implied repeal of the section 4(j) geographical limitation on construction of power houses.

This Court's recent admonition, in a case involving the extent of jurisdiction asserted by the Federal Maritime Commission, in response to the commission's claim that its construction of the Shipping Act should be given great weight because of the commission's construction of the statute over an extended period is apropos:

> "This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."
> *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 738, 93 S.Ct. 1773, 36 L.Ed 2d 620 (1973).

Nor is there any issue here in which TVA may claim technical expertise justifying deference to its views. See *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977), where this Court, referring to the Securities Exchange Commission said:

> "Even if the Agency spoke with a consistent voice, however, its presumed 'expertise' in the securities-law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants."
> 430 U.S. 1, 41, fn-27.

"An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko,* 327 U.S. 358, 369, 66 S.Ct. 637, 90 L.Ed. 718 (1946); quoted, *Batterton v. Francis*, 432 U.S.416, 424, fn 8, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977). Recognizing this, the courts should be wary of applying the doctrine of deference to administrative construction of a statute in cases involving the agency's determination of its own authority, and should be especially suspicious when the agency has determined that it *has,* rather than that it *has not* the grant of power which is in issue.

Petitioners believe that Circuit Judge Celebrezze, dissenting from the majority opinion of the Court of Appeals' decision in the present case was correct in stating:

> "I do not believe it is appropriate to apply to this case the rule that a court should give great weight to a consistent statutory interpretation by an agency charged with the statute's administration. All of the cases cited in the majority opinion for this proposition concern federal administrative agencies which have been given some degree of discretion in administering federal policy. The TVA, on the other hand, is a federally owned corporation which exists for the purpose of supplying electricity and other related functions. The statute in question here is not one that the TVA has been given discretion to administer. Rather, the statute is the TVA's enabling provision that sets forth the scope of its powers. I do not believe a court should defer to an agency's interpretation of what statutory authority has been given to it by Congress.
>
> Appendix A, *infra,* p. A-12

IV. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN TVA V. HILL.

> "...while the majority seeks to distinguish *TVA v. Hill,* 431 U.S. 153 (1978), *aff'g* 549 F.2d 1064 (6th Cir. 1977), it seems to me that they ignore the teaching of *Hill* that appropriations of funds by Congress cannot serve to amend or repeal other Congressional enactments. The fact that Congress has appropriated funds for the Hartsville nuclear plant is just as irrelevant here as was the appropriation of funds for the Tellico Dam at issue in *Hill. See* 437 U.S. at 189-93.
>
> *Dissent, Celebrezze,* Appendix A, *infra*, p. A-12.

The majority opinion relies heavily upon the doctrine of legislative ratification with two arguments:

(l) Congress was well aware of TVA's construction and had ratified this construction by fund appropriations;

(2) Congress was provided with annual reports by TVA with maps of the region showing the watershed, service area, and plant locations; and after reading these reports Congress ratified TVA's interpretation by bond authorizations periodically increased over a period of years.

There is nothing in the appropriations acts or the bond authority acts which makes reference to TVA's geographical interpretation of the TVA Act.

TVA v. Hill addresses this this issue squarely:

> "We recognize that both substantive enactments and appropriations measures are 'Acts of Congress,' but the latter have limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need. House Rule XXI(2), for instance, specifically provides:
>
> > 'No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provision in any such bill or amendment thereto changing existing law be in order.'* [Emphasis added]. See also. Standing Rules of the Senate, Rule 16.4.
>
> Tennessee Valley Authority v. Hill, 437 U.S. 153, 190-191, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

The import of Justice Burger's opinion as it applies to this case is clear—legislative ratification via appropriations acts is not an appropriate means by which to comment upon substantive law. This principle applies with at least equal weight to legislative authorization for the issuance of bonds.

V. THE QUESTION OF WHERE TVA CAN BUILD ELECTRIC GENERATING PLANTS IS OVERDUE FOR RESOLUTION BECAUSE TVA IS ILLEGALLY BUILDING SUCH PLANTS OUTSIDE THE TENNESSEE VALLEY AND IS RELYING UPON LOWER COURT DICTA AS JUSTIFICATION.

Previous Interpretations

The Court of Appeals indicated in the majority opinion that there were four cases that had previously touched upon this issue, *United States ex rel. TVA v. An Easement & Right-of-way, Logan Co., Ky,* 375 F. 2nd 120 (6th Cir. 1967), *United States ex rel TVA v. Puryear,* 105 F. Supp. 534 (W.D. Ky. 1952), *Rainbow Realty Co. v. Tennesee Valley Authority,* 124 F. Supp. 436 (M.D. Tenn. 1954), and *Illinois Central R. Co. v. TVA,* 445 F. 2nd 308 (6th Cir. 1971). Petitioners would respectfully disagree with the majority that these center around the same issue. The first three cases deal with the condemnation of land for powerline rights-of-way. The TVA Act specifically permits the TVA to run power lines wherever it deems necessary to "unite the various power installations into one or more systems by transmission lines" (16 U.S.C.§831c(j) and to construct "transmission lines within transmission distances from the place where generated, and to interconnect with other systems." (16 U.S.C.§831k).

The fourth case, *Illinois Central v. Tennessee Valley Authority,* 445 F. 2d 308 (6th Cir., 1971), hereinafter called *Illinois Central,* upheld the condemnation of land located outside the Tennessee River watershed for the purpose of constructing a coal conveyor belt for portage of coal from coal mines outside the watershed to a barge facility on the Ohio River, from which the coal would be transported to the TVA's existing steam plants. The Sixth Circuit Court found this condemnation

to be for the TVA's "legitimate statutory purposes." 445 F. 2d 308, 312. "We think TVA has authority to mine and ship coal from its reserves as an integral part of its generating operations and to construct the facilities necessary for those functions." *Ibid* at p. 314.

However, the opinion in *Illinois Central* concluded with this statement: "We hold only that the present exercise of power does not exceed the limits of the Act" (445 F. 2d 308, 315). The construction or location of steam plants was not an issue before the court, and the careful opinion by Judge Miller makes no excursions into that issue. The "facilities" held to be permissible outside the Tennessee River watershed were simply a coal conveyor system.

The majority opinion, in the Court of Appeals below, keyed upon this language which it quoted from the *Illinois Central* case:

> [i]t is provided that proceeds so raised [by the sale of bonds by TVA] may be used "for other purposes incidental" to performing the power generating and transmitting functions authorized by the Act. 16 U.S.C. § 831n-4(a). *If, as we think, the Act does not bar TVA from constructing facilities outside the Tennessee Valley,* and the mining and shipping of coal is a necessary incident to the power generating function, then this [bond issuing authority] amendment strengthens our view that the TVA has the authority to provide the facilities which it finds necessary to perform its functions. [Emphasis added.]
>
> 606 F.2d 143, 148, Appendix A, *infra,* pp.A.10-11.

The majority misses the point that the Illinois Central case is about activities *incident to* the power generating function. 16 U.S.C.§831c(g) provides the authority for such powers as may be necessary or appropriate for the exercise of the powers specifically conferred upon the TVA within the act. Certainly if TVA were authorized to operate a coal fired generating plant, 16 U.S.C.§831c(g) would permit them to obtain the coal from wherever coal was available and build ancillary facilities to get their coal to the plant. As was stated within the dissenting opinion of Judge Celebrezze:

> "This court's prior decisions in *United States ex rel. TVA v. Easement and Right of Way,* 375 F. 2d 120 (6th Cir. 1967), and *Illinois Central R.R. co. v. TVA,* 445 F. 2d 308 (6th Cir.

1971), do not control this case and need not be overruled in order to reverse the district court. The former dealt with *power transmission lines* and the latter concerned a coal conveyor belt. Neither dealt with the issue at hand, *vis.*, whether the TVA can build a *power house* at a point not along the Tennessee River or its tributaries. I believe it cannot."

606 F. 2 143, 149, Appendix A, *infra*,pp.12-13, (Emphasis added)

Consequences of Failure to Resolve the Issue

In the court below, the Court of Appeals majority opinion stated:

> We decline to find that TVA has chosen an incorrect construction of an ambiguous statute for at least 29 years while it otherwise has faithfully fulfilled the purposes of the Act. We see no larger social benefit which would flow from such a holding at this late date.
>
> 606 Fed 143, 148, Appendix A, *infra*, p.10

Petitioners respectfully suggest that this diverts attention from the importance of judicial review of Congressional grants of power to federal agencies, so that the executive branch will be held to the law. Expansion of costly programs based upon a faulty reliance upon non-existent authority may eventually meet with justifiable, even if tardy, legal opposition. That none has appeared in 29 years should not create a corporate immunity. Nor should it bar relief to those who first seek to raise the issue, as have the petitioners here.

Is the Tennessee Valley Authority allowed to build power plants outside the Tennessee River Valley? If so, may it build plants in the Cumberland River Valley? In the Ohio River Valley? In the Missouri River Valley? In the Colorado River Valley? TVA's authority comes not from itself but from the TVA Act. If sections 4(i) and (j) do not place a geographic limit on the authority of the TVA to build power plants, there is no language in the TVA Act to keep the TVA from building power plants in Alaska and Hawaii. Clearly such interpretation would be contrary to the purposes and scheme of the Act. To allow the TVA to decide the extent of its own authority was never the

intention of Congress.

Theorizing over the significance of inserting or omitting a comma or omitting a semi-colon in sections 4(i) and (j) should not obscure the obvious fact that the geographical language was inserted in those sections as a limitation on TVA's domain. Only this Court can resolve the differing interpretations of that limitation.

CONCLUSION

The writ of certiorari should issue, directed to the United States Court of Appeals for the Sixth Circuit, bringing this matter before this honorable Court.

Respectfully submitted,

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APPENDIX A

No. 77-1243

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM M. YOUNG and
FAITH ADAMS YOUNG,
Plaintiffs-Appellants,

v.

TENNESSEE VALLEY AUTHORITY et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed September 24, 1979.

Before: EDWARDS, Chief Judge, WEICK and CELEBREZZE, Circuit Judges.

WEICK, Circuit Judge, delivered the opinion of the Court in which EDWARDS, Chief Judge, joined. CELEBREZZE, Circuit Judge (pp. 12-13), filed a separate dissenting opinion.

WEICK, Circuit Judge. This appeal involves the legal question whether the Tennessee Valley Authority (TVA) has authority under the Tennessee Valley Authority Act of 1933, 16 U. S. C. § 831 *et seq.*, to construct the Hartsville nuclear powered electric generating plant on a site located on the Cumberland River near Dixon Springs, Tennessee, outside the watershed of the Tennessee River. We hold that the TVA does possess such authority and it is supported by its own frequent and long standing construction of the Act and the evidence of ratification thereof by Congress.

The facts are not in dispute. Appellants are owners of a 150 acre farm located in Dixon Springs, Tennessee, near the site of TVA's proposed multimillion dollar Hartsville Nuclear Electric Generating Plant on the Cumberland River. Appellants filed this suit in the District Court for the Middle District of Tennessee seeking to enjoin TVA from performing site preparation for the power plant and to obtain a declaratory judgment that TVA had no statutory authority to condemn land near the Cumberland River or to construct said plant on the Cumberland River. The Cumberland River drains an area adjacent to the area drained by the Tennessee River and its tributaries. Although the Cumberland and Tennessee Rivers converge and flow close to one another for some distance before both empty into the Ohio River, see *United States ex rel. TVA* v. *Two Tracts of Land*, 456 F.2d 264 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972), it is admitted that the Cumberland River is not a tributary of the Tennessee River. The proposed plant is located well within the TVA's statutorily defined 80,000 square mile service area. When oral argument of the appeal was heard before this court on April 9, 1979, the plant was 15% completed.

The District Court denied the motion for an injunction and dismissed appellant's complaint for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). The only question of law before this court is whether the Tennessee Valley Authority has authority under the Tennessee Valley Authority Act of 1933 to construct power plants outside the watershed of the Tennessee River.

The TVA was created

> For the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and *for agricultural and industrial development*, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee

River and Mississippi River Basins. . . . 16 U. S. C. § 831 [Emphasis added.]

The statutes granting the TVA authority to condemn property and to construct power plants are 16 U. S. C. §§ 831c(i) and (j) which read in pertinent part as follows:

> (i) *Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries,* and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, *and to condemn all property that it deems necessary for carrying out the purposes of this chapter.* . . . [Emphasis added.]
>
> (j) *Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries,* as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; *and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries,* and to unite the various power installations into one or more systems by transmission lines. [Emphasis added.]

The phrasing of both paragraphs is certainly ambiguous. In paragraph (i) the phrase "at any point along the Tennessee River, or any of its tributaries" can be read to modify the words "navigation projects" or it can be read to modify the

entire preceding list of words including the words "power houses." If the phrase is read to modify the entire list, then TVA's power to condemn is narrow and confined to condemnation "at any point along the Tennessee River, or any of its tributaries." If the phrase modifies only "navigation projects," as TVA contends, then TVA's power to condemn is broad and only condemnation of land for navigation projects is confined to "any point along the Tennessee River, or any of its tributaries." Similarly, in paragraph (j) the phrase "in the Tennessee River and its tributaries" can be read to modify only the words "incidental works," as TVA contends, so that only incidental works constructed by TVA must be actually located *in* the Tennessee River and its tributaries, or the phrase can be read to modify the entire preceding list including the words "power houses." Congress could easily have used the phrase "on the banks of the Tennessee River or its tributaries" or the phrase "within the territory drained by the Tennessee River or its tributaries," instead of the phrase "in the Tennessee River and its tributaries" in paragraph (j), or, conversely, Congress could easily have more clearly stated that TVA was free to construct power plants anywhere, so long as said plants were demonstrably constructed to achieve Congress' express purpose of fostering agricultural and industrial development in the Tennessee River Valley and the larger service area, however the Act contains no such clear statement.

Appellants concede that TVA has the authority under paragraph (i) to "condemn land in Wyoming at its Morton Ranch in order to obtain uranium for its nuclear reactors" [Appellant's Reply Brief at 7], thus appellant in one instance has adopted TVA's broad construction of paragraph (i), yet appellant contends that TVA lacks authority under similar ambiguous language in paragraph (j) to construct a power house outside the Tennessee River watershed. The parties agree that the TVA can build dams and navigation projects only on the Tennessee River or on one of its tributaries.

In considering the legality of agency action under an enabling statute, we do not write on a clean slate. Ordinarily, a court should give great weight to the frequent, consistent, and lang standing construction of a statute by an agency charged with its administration. *See e. g. Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978); *E. I. du Pont de Nemours & Co.* v. *Collins,* 432 U.S. 46, 54-55 (1977); *Chemehuevi Tribe of Indians* v. *FPC,* 420 U.S. 395, 409-10 (1975); *NLRB* v. *Boeing Co.,* 412 U.S. 67, 74-75 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433-34 (1971); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). Particularly this is true with respect to a statute which is reasonably susceptable of two different interpretations. The construction of a statute by those agencies charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress with knowledge of the facts has consistently taken no steps to prohibit or curtail the administrative actions; but has approved them. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969). The record indicates that locations for TVA power plants historically have been chosen for economic reasons, such as minimizing the cost of fuel transportation and construction costs. The construction and operation of power plants and the distribution of electric energy generated therefrom requires expertise which should be accorded deference by the courts. The TVA Act in issue must be liberally construed to carry out the purposes of Congress which are, *inter alia,* to promote interstate commerce and the public welfare. 16 U. S. C. § 831dd; *United States ex rel. TVA* v. *Welch,* 327 U.S. 546, 551 (1946).

The legislative history of the Act contains no clear guidance. H. R. 5081, the original house bill, set forth the TVA's authority to acquire land and to construct "dams, reservoirs, power houses, power structures, and navigation projects, in the Tennessee River and its tributaries." The Senate amendment contained no such equivalent provision. The Act was recast into its present form and adopted by Congress with almost

no explanation. The conference committee inserted the words "incidental works" at the end of the list presently contained in section 4(j), however, we do not consider such insertion, without more, clearly to support either construction.

TVA concedes that dams and reservoirs must be located on the Tennessee River or its tributaries. *See* H. R. Rep. No. 130, 73d Cong., 1st Sess. 16-20 (1933); H. R. Rep. No. 48, 73d Cong., 1st Sess. (1933). Appellants argue that this concession amounts to a concession that all items listed in section 4(j) must be located in the Tennessee River or its tributaries, however this conclusion does not necessarily follow. TVA's dams and reservoirs would be expected to be located only in the Tennessee River or its tributaries. One of the express purposes in the Act for the creation of the TVA was for it to control the destructive flood waters of the Tennessee River. 16 U. S. C. § 831, quoted *supra.* Dams or reservoirs in rivers other than the Tennessee River or its tributaries would have no effect on flooding by the Tennessee River.

We believe that the construction of the statute by TVA should be given great weight because of the frequent consistency and longevity of its construction, and the reliance placed thereon by the agency since at least the early 50's. In 1951 the TVA relied upon its interpretation of the statute to construct the Shawnee Power Plant, a coal fired steam electric generating plant located on the Ohio River below Paducah, Kentucky. The Shawnee Power Plant is located not only outside the Tennessee River watershed but outside the TVA's statutorily defined service area as well. In 1953 the TVA constructed the Gallatin Power Plant, a coal fired steam electric generating plan located outside the Tennessee River watershed on the Cumberland River only 18 miles from the Hartsville Nuclear Power Plant site here in issue. In 1959 the TVA constructed the Paradise Power Plant, a coal fired steam electric generating plant located on the Green River, outside the Tennessee River watershed. In 1968 the TVA constructed

the Cumberland Power Plant, a coal fired steam electric generating plant located on the Cumberland River, outside the Tennessee River watershed. The proposed Hartsville Power Plant, therefore, would be the third TVA electric generating plant located on the Cumberland River within the Cumberland River watershed, a watershed adjacent to, but not within, the watershed of the Tennessee River. The TVA has relied on its construction to spend several billion dollars to construct over a 28 year period power plants outside the Tennessee River watershed which power plants have provided the electricity necessary for the present economic growth and prosperity which characterizes the Tennessee River Valley sunbelt region at this time.

Although Congress since 1933 could have more clearly announced its continued support for TVA's construction of sections 4(i) and (j), we believe that there is evidence that Congress has been well aware of TVA's construction of the statutes and has ratified said construction. The Shawnee Power Plant, for example, located outside both the Tennessee River watershed and the larger TVA service area, was constructed from 1951 to 1953 with funds appropriated by Congress for that purpose after full hearings. *See Hearings Before the Senate Committee on Appropriations,* 81st Cong., 2d Sess. 241 (1950); *Additional Hearings Before Subcommittees of the House Committee on Appropriations,* 81st Cong., 2d Sess., pt. 5 at 32 (1950); 64 Stat. 1223, 1229 (1951). Congress after further hearings appropriated funds in 1952 for the construction of the Gallatin Power Plant located on the Cumberland River outside the Tennessee watershed. *See Hearings Before Subcommittees of House Committee on Appropriations,* 82d Cong., 2d Sess., pt. 3 at 76-77, 85 (1952); 66 Stat. 637, 645 (1952). The location of the proposed plants was indicated in the 1950 and 1952 hearings. We are mindful that proceedings before House and Senate committees do not establish the intent of Congress as a whole. *See TVA* v. *Hill,* 437 U. S. 153 (1978), *aff'g* 549 F. 2d 1064 (6th Cir.

1977). An appropriation enacted by Congress, for construction of electric generating plants after Congressional hearings is, however, evidence of Congressional ratification.

There is other evidence of Congressional awareness of TVA action and intent. During the period in question TVA was under a statutory duty to file written reports of its actions and intentions with Congress and the President. 16 U. S. C. § 831h(a). Every TVA annual report from 1951 to 1957 specifically described the location of Shawnee, Gallatin, or both. *See* 1951 TVA Ann. Rep. 7; 1952 TVA Ann. Rep. 18-19; 1953 TVA Ann. Rep. 15; 1954 TVA Ann. Rep. 14-15; 1955 TVA Ann. Rep. 7-9; 1956 TVA Ann. Rep. 10; 1957 TVA Ann. Rep. 47. Facing page 1 of the 1953, 1954, 1955, and 1956 reports is a map of the region showing the boundaries of the Tennessee River watershed, the boundaries of the larger TVA service area, and the location of the Shawnee and Gallatin plants.

Of less weight, but nevertheless some evidence of Congressional awareness of TVA's actions and intent is the grant in 1959 by Congress to TVA of authority to issue bonds for, *inter alia*, the construction of power plants. Since 1959 Congress has increased the bond issuing authority limit three times from $.75 billion to $15 billion. 80 Stat. 346 (1966); 84 Stat. 915 (1970); 89 Stat. 750 (1975). In 1959 TVA used bond funds to construct the Paradise Steam Plant, *supra,* and in 1966 similarly used bond funds to construct the Cumberland Steam Plant, *supra.* Indeed, the Hartsville Nuclear Power Plant in issue is being constructed with funds from bonds issued pursuant to the 1975 amendment to the bond authority which amendment allowed the issuance by TVA of up to $15 billion in bonds for, *inter alia,* the construction of power plants. Each of these three plants is located outside the Tennessee River watershed but well within the TVA service area. TVA duly informed Congress and the President in annual reports from 1960 to 1975 of its plans to build

Paradise, Cumberland, and Hartsville and its progress in said projects. *See e.g.* 1960 TVA Ann. Rep. 10, 18; 1962 TVA Ann. Rep. 20; 1965 TVA Ann. Rep. 44; 1966 TVA Ann. Rep. 48; 1968 TVA Ann. Rep. 39; 1974 TVA Ann. Rep. 49; 1975 TVA Ann. Rep. 45. This grant of bond issuing authority by Congress, followed by several increases in the issuance authority over a period of years in the face of annual reports by the responsible agency is evidence of ratification by Congress.

Appropriation by Congress of funds for agency action in the face of a construction placed upon an enabling act by the agency has the effect of ratifying the agency action when the agency construction is consistent with the purpose of the legislation. *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U. S. 275, 292-94 (1958); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116 (1947); *Brooks* v. *Dewar*, 313 U. S. 354, 360-61 (1941); *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 147 (1937); *TVA* v. *Kinzer*, 142 F. 2d 833, 837 (6th Cir. 1944). The record shows that TVA has acted to fulfill its responsibilities under the Act and has been supported in its efforts by Congress. This rule regarding Congressional ratification of an agency construction of a statute should apply with even greater force where Congress not only appropriated funds to support agency action but Congress and the President by statute were informed of the position of the TVA by reports for the last 28 years.

Appellants' reliance on the decision of the Supreme Court in *Hill* v. *TVA*, 437 U. S. 153 (1978) involving an endangered species of fish called snail darters is misplaced. Unlike the agency action in the present case which the Act could reasonably be construed as authorizing, the agency action in *Hill* specifically violated not only the express provisions of the Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.* (1974), but also violated regulations issued by the Secretary of the Interior in which it was declared that pursuant to § 7 "all Federal Agencies must take such action as is necessary

to insure that actions authorized, funded or carried out by them do not result in the destruction or modification of the critical habitat area." The court in *Hill* also applied the rule that repeals by implication are not favored. No such claim was made by TVA in the present case that the Act was repealed in any respect. Its claim was simply that its actions were authorized by its long standing construction of the statute and the evidence of ratification thereof and not prohibited specifically by an Act of Congress.

We decline to find that TVA has chosen an incorrect construction of an ambiguous statute for at least 29 years while it otherwise has faithfully fulfilled the purposes of the Act. We see no larger social benefit which would flow from such a holding at this late date.

This court previously touched upon this issue in different circumstances. In *United States ex rel. TVA* v. *An Easement & Right-of-Way, Logan Co., Ky.*, 375 F. 2d 120 (6th Cir. 1967), a condemnation proceeding wherein the TVA sought to condemn land located within the service area for the construction of power transmission lines, this court affirmed a District Court opinion which upheld the authority of the TVA to condemn such land and to build the Paradise Steam Plant. Similarly, in *Illinois Central R. R.* v. *TVA*, 445 F. 2d 308 (6th Cir. 1971), a condemnation proceeding wherein the TVA sought to condemn land located outside the TVA service area for the construction of a coal conveyor belt, this court in an opinion written by Judge William E. Miller, affirmed the finding of the District Court that the TVA had the authority under the Act to condemn such land and further stated with respect to the Cumberland and Shawnee power plants that:

> [i]t is provided that proceeds so raised [by the sale of bonds by TVA] may be used "for other purposes incidental" to performing the power generating and transmitting functions authorized by the Act. 16 U. S. C. § 831n-4(a). *If, as we think, the Act does not bar TVA*

> *from constructing facilities outside the Tennessee Valley,* and the mining and shipping of coal is a necessary incident to the power generating function, then this [bond issuing authority] amendment strengthens our view that the TVA has the authority to provide the facilities which it finds necessary to perform its functions. [Emphasis added.]

We are not convinced that we should overrule our decisions. See also, *United States ex rel. TVA* v. *Puryear*, 105 F. Supp. 534 (W. D. Ky. 1952); *Rainbow Realty Co.* v. *Tennessee Valley Authority*, 124 F. Supp. 436 (M. D. Tenn. 1954).

The judgment of the District Court is affirmed.

CELEBREZZE, Circuit Judge dissenting.

I respectfully dissent.

First, I interpret the relevant statute, 16 U.S.C. § 831c(i) & (j), to limit TVA's ability to condemn land for power houses to points along the Tennessee River or its tributaries. I believe this is the clear import of the statutory language and we should not stretch its meaning in this case.

Second, I do not believe it is appropriate to apply to this case the rule that a court should give great weight to a consistent statutory interpretation by an agency charged with the statute's administration. All of the cases cited in the majority opinion for this proposition concern federal administrative agencies which have been given some degree of discretion in administering federal policy. The TVA, on the other hand, is a federally owned corporation which exists for the purpose of supplying electricity and other related functions. The statute in question here is not one that the TVA has been given discretion to administer. Rather, the statute is the TVA's enabling provision that sets forth the scope of its powers. I do not believe a court should defer to an agency's interpretation of what statutory authority has been given to it by Congress.

Third, while the majority seeks to distinguish *TVA* v. *Hill*, 437 U.S. 153 (1978), *aff'g* 549 F.2d 1064 (6th Cir. 1977), it seems to me that they ignore the teaching of *Hill* that appropriations of funds by Congress cannot serve to amend or repeal other Congressional enactments. The fact that Congress has appropriated funds for the Hartsville nuclear plant is just as irrelevant here as was the appropriation of funds for the Tellico Dam at issue in *Hill*. *See* 437 U.S. at 189-93.

Fourth, this court's prior decisions in *United States ex rel. TVA* v. *Easement and Right of Way*, 375 F.2d 120 (6th Cir. 1967), and *Illinois Central R.R. Co.* v. *TVA*, 445 F.2d 308

(6th Cir. 1971), do not control this case and need not be overruled in order to reverse the district court. The former dealt with power transmission lines and the latter concerned a coal conveyor belt. Neither dealt with the issue at hand, *viz.*, whether the TVA can build a power house at a point not along the Tennessee River or its tributaries. I believe it cannot.

I would reverse and remand with directions to grant the injunction.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

No. 76-154-NA-CV

WILLIAM M. YOUNG and
FAITH ADAMS YOUNG

v.

TENNESSEE VALLEY AUTHORITY, et al.

ORDER

In accordance with the memorandum contemporaneously filed, the motion to dismiss the plaintiff's amended complaint, heretofore filed by the defendant Tennessee Valley Authority, is hereby granted. This cause is therefore DISMISSED.

MEMORANDUM

This action is presently before the court on the motion of the defendant Tennessee Valley Authority ("TVA") to dismiss the plaintiffs' amended complaint, or in the alternative for summary judgment.

Plaintiffs' original complaint raised a number of broad challenges to the construction by TVA of the Hartsville Nuclear Plant at a site on the Cumberland River near plaintiffs' home in Dixon Springs, Tennessee. Their amended complaint significantly narrows the controversy, at least with respect to the legal issues involved, to the question of whether TVA has the statutory authority to construct an electric generating plant on the Cumberland River. All parties seem to concede that the ultimate determination of this lawsuit hinges on the answer to that question.

The relevant statutory provisions at issue here are found in Section 4 of the Tennessee Valley Authority Act, 16 U.S.C. § 831c. That section provides in pertinent part as follows:

> Except as otherwise specifically provided in this chapter, the Corporation –
>
> * * *
>
> (i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, ... and to condemn all property that it deems necessary for carrying out the purposes of this chapter....
>
> (j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as ... will best serve to promote navigation on the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines.

Plaintiffs maintain that subsections (i) and (j) were intended by Congress to limit acquisition of land and construction of power plants by TVA to points "in or along" the Tennessee River or its tributaries. Thus, they argue, since the Cumberland River--the site of the Hartsville Nuclear Plants--is not a tributary of the Tennessee River, but of the Ohio River, TVA has no statutory authority to construct a power plant there.

TVA argues that such was not the intention of Congress at all, and that a careful reading of the pertinent language in subsection (i) and (j) reveals that the phrases "at any point along the Tennessee River ... " and "in the Tennessee River ..." modify only the words immediately before those phases, rather than the entire preceding passages. Thus, under TVA's parsing of the statute, only "navigation projects" and "incidental works" need be confined to points in or along the Tennessee River and its tributaries, whereas no specific geographical limitations are placed on the location of "power houses."

At least with respect to subsection (i), the interpretation urged by TVA is particularly pursuasive, in that Congress saw fit to insert a comma after the phrase "other structures," thus separating that term--and those preceding it--both grammatically and conceptually from the unpunctuated phrase,

"and navigation projects at any point along the Tennessee River..." Had Congress intended the meaning urged by plaintiffs, it would have been more expressive of that intent for it to have omitted the comma after "other structures," thus allowing the crucial phrase to read "...and other structures and navigation projects at any point along the Tennessee River...," to the series of terms preceding them.

It is the absence in subsection (j) of the word "other" immediately before the phrase "...incidental works in the Tennessee River..." which suggests, although less persuasively, that TVA's interpretation of that provision may also be correct. There is no other syntactical clue in the pertinent language of that subsection which would indicate that the phrase, "... incidental works in the Tennessee River..." was intended to relate back to the series of terms preceding it. Indeed, a logical reading of subsection (j) refutes such an interpretation, for it would be an absurdity for Congress to require that all power houses or power structures be constructed "*in* the Tennessee River..."

The foregoing syntactical analysis, while suggestive of the more plausible interpretation to be given the statutory language, is conclusive of litrtle more than that the Act is susceptible of more than one interpretation. A more reliable indication of its intended meaning may be had by reference to the pertinent legislative history, administrative implementation, and judicial construction of the Act.

The administrative implementation of the Act leaves little doubt as to the interpretation given subsections (i) and (j) by TVA. The constyruction and operation of electric generating plants on the Ohio (Shawnee Steam Plant), Green (Paradise Steam PLant), and Cumberland (Gallatin and Cumberland Steam Plants) Rivers, none of which are tributaries of the Tennessee River, bears ample testimony to TVA's conviction that it is not limited to the Tennessee River watershed in the selection of sites for its power plants.[1]

LEGISLATIVE HISTORY

More significant, however, is the Congressional response to TVA's interpretation of the Act. In the early 1950's, TVA

devised plans to construct the first two steam plants outside the Tennessee River watershed, Gallatin and Shawnee. Since this proposal came some eight years before the enactment of the revenue bond amendment, (Section 15(d) of the Act, 16 U.S.C. § 831n-4) which authorized large scale issuance of bonds to finance TVA's power projects, the funds for the Gallatin and Shawnee plants had to come from Congressional appropriations. The legislative history of these appropriations demonstrates that Congres was informed of TVA's interpretation of the Act, was advised of the proposed location of the two plants, and decided, albeit not without some dissention, to appropriate the funds necessary for their construction.

The initial funds for the Shawnee Plant were included in the second supplemental Appropriation Act of 1951. During the Senate committee hearings on the legislation, Senator Guy Cordon of Oregon inquired of TVA Board Chairman Gordon R. Clapp as to whether the Shawnee facility would be located "[i]nside or outside of [TVA's] present service area?" Clapp responded that the plant would be "[o]utside [TVA's] present service area if we decide to locate it at the site of the AEC facilities."[2] The "AEC facilities," as the Senate committee undoubtedly knew from remarks made during the course of the hearings, were located on the Ohio River, a few miles west of Paducah, Kentucky. Senator Cordon then asked if TVA had made the decision to locate at the AEC site, to which Clapp responded that "in all probability" the plant would be built there.[3] Clapp later made it clear in his remarks before a House appropriations subcommittee that TVA had indeed decided to locate the plant at the AEC site.[4] Though apprised of the probable location of the Shawnee plant, no member of the Senate committee questioned the propriety of its location, and Congress subsequently authorized the requested appropriation for the plant.[5]

Admittedly, the geographical references in the 1951 hearing were somewhat obscure, and it is possible that not every member of the committees involved appreciated the fact that the proposed Shawnee plant was outside the Tennessee River watershed.

However, Senator Cordon's inquiries as to whether the plant would be located within TVA's existing "service area" constituted a strong indication of Congressional concern with geographic boundaries.

The issue was presented to Congress with greater clarity and directness, and was explored in more detail, during the House subcommittee hearings on the Supplemental Appropriations Act of 1953. TVA was seeking funding for the construction of four additional generating units at the Shawnee plant and for the commencement of construction on the Gallatin plant. In testifying before the Independent Offices Subcommittee, Board Chairman Clapp explained that the Gallatin facility would be "... a new plant in middle Tennessee near Gallatin, in Sumner County, *on the Cumberland River.*"[6] Representative John Phillips of California, one of TVA's principal critics on the subcommittee, thereupon undertook to question Clapp in considerable detail concerning the capacity, location and cost of the proposed units. During the course of this examination, the following exchange took place:

> MR. PHILLIPS: ...I should like to know if any of those [generating units] are outside what is called your TVA authorized area.
> MR. CLAPP: None of them are outside the TVA service area except Shawnee. It is also just outside the Tennessee Valley. All the others are either in the valley or the service area or both.[7]

Clapp's response thus put the subcommittee members on express notice that not only was the Shawnee Steam Plant, where new units were to be built with Congressional appropriations, outside the Tennessee River watershed, but that some of the other proposed plants, though located in the TVA service area, were *outside* the Tennessee Valley.

Congressman Phillips continued his inquiry:

> MR. PHILLIPS: How do you get the authority to build plants outside your area?
> MR. CLAPP: As we have brought out in the discussions with this committee on several other occasions the TVA Act authorizes us to build steam plants. It authorizes us to serve

in the national defense. The Shawnee location was the most economical way for us to satisfy the requirement for atomic energy operations at Paducah. It is about ten (10) miles outside the Tennessee watershed area and the power service ar[illegible]

MR. PHILLIPS: Do you not think that is stretching your authority a little bit over there?

MR. CLAPP: We do not think so, Mr. Phillips.[7a]

With the proposition of TVA's geographic authority thus clearly delineated, Congress enacted the appropriations bill which provided funds for the Shawnee units and the Gallatin plant.[7b]

The Sixth Circuit explained the operative effect of such appropriations in *Tennessee Valley Authority v. Kinzer,* 142 F.2d 833 (6th Cir. 1944). At issue in that case was the effect of Congressional appropriations for TVA's retirement system on TVA's authority under section 3 of the TVA Act to devise and implement such a system through appropriate regulations. The court reasoned that:

> ...Congress, by regularly appropriating funds to enable the Authority to make its contributions to the System, has demonstrated its intention that the statutory mandate is to be construed and understood in accordance with the settled construction placed upon it by the Authority, as disclosed by the Rules and Regulations setting up the retirement system. The voting of such appropriations, in the face of the construction placed upon the Act by the Authority, has an effect similar to that resulting from the re-enactment of a statute, the provisions of which had, theretofore, been interpreted by regulations; they are deemed to have received *legislative ratification* and, thereby, to have become embedded in the law; and are to be given the same force and effect as the statute, itself. (Emphasis added) [142 F.2d at 837].

See also Brooks v. Dewar, 313 U.S. 354, 360-61, 61 S.Ct. 979, 85 L.Ed. 1399 (1941); *United States ex rel. Tennessee Valley Authority v. Two Tracts of Land, 456 F 2d 264, 267 (6th Cir. 1972), cert. denied,* 409 U.S. 887; *Rainbow Realty Co. v. Tennessee Valley Authority,* 124 F. Supp. 436, 439-40 (M.D. Tenn. 1954).

Less persuasive but nonetheless significant, evidence of Congress' ratification of TVA's interpretation of its statutory authority to build plants outside the Tennessee River watershed may be found in its enactment, on three separate occasions, of legislation amending Section 15d (16 U.S.C. § 831n-4) of the TVA Act, to increase the amount of revenue bonds which TVA could have outstanding, after having been advised that TVA had used proceeds from such bonds in previous years to construct steam plants outside of the Tennessee Valley.

The Paradise Steam Plant, located on the Green River (a tributary of the Ohio), was begun in 1959, just after the enactment of Section 15d, with funds raised in part from the sales of bonds under that section. This fact was reported to Congress by TVA in its 1960 annual report, which contained a revised map opposite page 1 depicting the site of the Paradise plant clearly outside of the Tennessee River watershed. Subsequent annual reports contained similar information. Thus apprised of TVA's bond-financed activities, Congress in 1966 enacted legislation amending Section 15d by increasing the allowable outstanding bond amounts from $750 million to $1.75 billion.[8]

Construction, financed by Section 15d bond sales, began on the Cumberland Steam Plant, located on the Cumberland River, in 1968. This fact was reported to Congress in TVA's 1968 annual report, accompanied by a map similar to the one described above. In 1970, another amendment to Section 15d was proposed to Congress to raise TVA's bond authority to $5 billion. During the Senate Subcommittee hearings on the amendment, TVA Board Chairman Aubrey Wagner was questioned by Senator John Cooper of Kentucky regarding the location of both the Paradise and Cumberland plants. Senator Cooper himself demonstrated a familiarity with the location of the Paradise plant, inquiring as to whether it was " ...operating in Muhlenberg County," Kentucky, to which Wagner replied in the affirmative.[9] Senator Cooper then asked where the Cumberland plant was located, and Wagner replied, "It is on the Cumberland River, in Tennessee..."[10] Subsequently, the amendment was passed by Congress and signed into law.[11]

TVA's 1974 and 1975 annual reports both specifically mentioned TVA's plans for the construction of the Hartsville plant which is the subject of the present controversy. Having had the benefit of these reports, together with letters sent to the President of the Senate[12] and Speaker of the House[13] by Board Chairman Wagner in which he explained the need for a $10 billion bond authorization increase as a means of financing equipment at the Cumberland and Hartsville plants, Congress once again amended Section 15d, granting the requested increase.[14]

Plaintiffs argue, in effect, that Congress really had no idea what it was doing when it appropriated funds for the Shawnee and Gallatin plants, or when it authorized an increase in TVA's bond authority to finance the Paradise, Cumberland, and Hartsville plants. Whatever popular support among the general electorate such a contention may have, it is not a matter of which this court can take judicial notice. This court must assume that members of Congress are able to read maps, that they sometimes read reports, that they listen critically to the testimony of witnesses in committee hearings, and that at least the Senators and Congressmen from the affected region have a sufficient familiarity with the geography of their home states to know which watercourses feed the Tennessee River system.

Plaintiffs would have this court believe thath TVA "snuck by" Congress on at least four occasions, spending millions of dollars in the process, all in violation of an Act which has been in effect for over forty years. This court refuses to accept such a theory.

This court's view is apparently shared by other courts in this circuit. In *United States ex rel. Tennessee Valley Authority v.An Easement & Right-of-Way, Etc.*, 246 F. Supp. 263 (W.D. Ky. 1965), it was contended by the defendant property owners that TVA had no right to condemn an easement across their land for a transmission line running from the Paradise steam plant because, *inter alia*, TVA had no statutory authority to build such a plant outside the Tennessee River watershed. The court rejected that argument, specifically making the following finding of fact:

> 8. Of the steam plants built by TVA, three are located outside the Tennessee Valley--Shawnee, Gallatin, and Paradise.[15] Congress appropriated funds for the construction of both Shawnee and Gallatin after having been advised of the projected locations for the plants. No funds were appropriated for the Paradise Steam Plant since it was financed by revenues and the sale of bonds.
>
> [246 F.Supp. at 267]

The court then made the following specific conclusions of law:

> 5. Construction of the Paradise Steam Plant and the transmission lines connecting it with the TVA power system is authorized under the TVA Act. Rainbow Realty Co. v. Tennessee Valley Authority, 124 F. Supp 436 (M.D.Tenn. 1954); United States ex rel. Tennessee Valley Authority v. Puryear, 105 F.Supp. 534 (W.D.Ky. 1952); United States ex rel and for use of Tennessee Valley Authority v. An Easement and Right-of-Way, Etc., 235 F.Supp. 376 (N.D. Miss. 1964).
>
> * * *
>
> 9. The Court concludes, as a matter of law, that plaintiff has the constitutional and statutory authority to build and operate Paradise Steam Plant and the transmission line involved in these proceedings and to acquire the property described in the complaint and declaration of taking. Accordingly, proper order [sic] will be entered overruling defendants' objections to the right to take the same.

On appeal, the Sixth Circuit affirmed the "well reasoned opinon" of the district court "for the reasons stated and upon the authorities set forth" in the district court's opinion. 374 F.2d 120, 121 (6th Cir. 1967).

Plaintiffs maintain that the foregoing case cannot be deemed to stand for the proposition that the TVA has authority to build power plants outside the Tennessee Valley since the precise issue before the court was the condemnation of defendants' property for construction of transmission lines. Moreover, they assert, the case had been originally remanded to the district court for consideration only of the issue of whether the Paradise plant was "connected with, auxiliary to, or [aided] in the distribution of electricity generated at any TVA hydro-electric plant," and not whether its construction was statutorily authorized. Thus, plaintiff's argue, the above-quoted language from the district court's opinion was mere dicta which should be ignored.

The obvious fallacy in plaintiff's contention is that the very reason the Sixth Circuit saw fit to remand the case was that the district court's initial determination had not been factually broad enough to allow the appellate court to answer the questions presented to it on appeal. Accordingly, the case was remanded, not only for determination of the question of whether the Paradise plant "aided in the distribution of electricity," but also of whether TVA "has authority to construct a steam plant anywhere at any place within 1,000 miles of its admittedly authorized hydro-electric plants, and therefrom distribute electricity." 336 F.2d at 78. Thus, while the condemnation of land for erecting transmission lines was the central issue before the court, the inescapable threshold question was the "legality" of the steam plant from which those lines ran.

Dispelling any doubt as to the meaning of its affirmance of the district court's opinion in the foregoing case, the Sixth Circuit latyer stated in *Illinois Central RR. v. Tennessee Valley Authority*, 445 F.2d 308 (6th Cir. 1971), that:

> Appellant concedes that TVA may acquire property by condemnation outside the Tennessee Valley watershed for transmission lines, but argues that its power of eminent domain to acquire property for other purposes outside such area has not been conferred by statute.
> We are unable to agree with this narrow construction of the power of eminent domain conferred upon TVA by statute to accomplish its broad purposes.
> * * *
> It would be violence to the statutory powers thus granted to confine TVA in the acquisition of properties by condemnation deemed necessary to accomplish its exceedingly broad purposes to the so-called Tennessee River watershed or to the Tennessee River and its tributaries. Clearly there is no express limitation in the Act to this effect, with three exceptions not applicable here...."
> [445 F.2d at 311-312]

While the precise issue in *Illinois Central* was the condemnation of land outside the Tennessee River watershed for the constrcution of a coal conveyor belt rather than a power plant, the court's conclusions as to the broad statutory authority

granted TVA by Congress are applicable with equal force to the present controversy. Also pertinent is the court's discussion of the presumption to be given administrative interpretation of an act:

> TVA has consistantly acquired properties of many descriptions beyond [the Tennessee Valley] to promote its valid functions and has administratively construed the Act to permit it to do so. Of these acquisitions Congress has been advised by annual reports statutorily required to be submitted. Such long-continued administrative construction, coupled with the failure of Congress to act to change it "creates," as the Supreme Court has explicitly pointed out, "a presumption in favor of the administrative interpretation. * * * " Costanzo v. Tillinghast, 287 U.S. 341, 345, 53 S.Ct. 152, 154, 77 L.Ed. 350 (1932).
> [445 F.2d at 312]

Further judicial support for the contention that TVA has authority under the Act creating it to construct plants outside the Tennessee River watershed appears in *United States ex rel. Tennessee Valley Authority v. Puryear*, 105 F. Supp. 534 (W.D. Ky. 1952), another controversy involving TVA's right to condemn land for the erection of transmission lines. One of defendant landowners' principal contentions was that "section 4 [of the TVA Act], especially in paragraph (i) and paragraph (j), limits construction of steamplants to points along the Tennessee River or its tributaries." 105 F.Supp. at 535. In rejecting this specific contention, the court declared that,

> There is undoubtedly statutory authority in the TVA Act, granted in section 4, for the construction of the Shawnee Steamplant [on the Ohio River]. The mere reading of the statute is convincing as to this.
> [105 F.Supp. at 535]

CONCLUSION

A logical reading, the administrative implementation, the legislative history, and the judicial construction of the TVA Act all support the conclusion that TVA is not limited to sites on the Tennessee River and its tributaries in the selection of locations for its power plants. While it is fair to assume that Congress intended some reasonable limit to the permissible geographic range of TVA's power plant operations, it does not appear that

TVA has yet exceeded that limit. And certainly in the instant case, TVA's Hartsville Nuclear facility poses no threat to that limit since its construction on the Cumberland River has been preceded by two steam plants--Gallatin and Cumberland--which have received implicit legislative sanction. The site of the Hartsville plant is well within TVA's present service area. In light of these and other considerations previously discussed, it is the conclusion of this court that TVA has authority, under the TVA Act, to construct the Hartsville plant on the Cumberland River.

Inasmuch as plaintiffs appear to concede that the resolution of the foregoing legal question is dispositive of their claim, an order dismissing this cause is appropriate.

(signed)
L. Clure Morton
United States District Judge

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[1]TVA also operates under lease, with an option to buy, the Thomas H. Allen Steam Plant, on the Mississippi River, which of course is also not a tributary of the Tennessee. *See Hearings Before a Subcommittee of the House Committee on Appropriations,* 88th Cong., 1st Sess., pt. 3, at 988 (1963).

[2]*Hearings Before the Senate Committee on Appropriations,* 81st Cong., 2d Sess. 241 (1950).

[3]*Id.*

[4]*Additional Hearings Before Subcommittees of the House Committee on Appropriations,* 81st Cong., 2d Sess., pt. 2, at 32 (1950).

[5]64 Stat. 1223, 1229 (1951).

[6]*Hearings Before Subcommittees of House Committee on Appropriations,* 82d Cong., 2d Sess., pt.3, at 77 (1952).(Emphasis added).

[7]*Hearings Before Subcommittees of House Committee on Appropriations,* 82d Cong., 2d Sess., 85 (1952).

[7]a *Id.*

[7]b 66 Stat. 637, 645 (1952).

[8]80 Stat. 346 (1966).

[9]*Hearings Before the Subcommittee of the Senate Committee on Public Works,* 91st Cong., 2d Sess., 18 (1970).

[10]*Id.*

[11]*84 Stat. 915 (1970).*

[12]*See S. Rep. No. 94-461, 94th Cong., 1st Sess. 14 (1975)*

[13]*See H.R. Rep. No. 94-510, 94th Cong., 1st Sess. 14-15 (1975)*

[14]*89 Stat. 750 (1975).*

[15]Construction on the Cumberland Steam Plant, also located outside the Tennessee Valley, did not begin until 1968, three years after the above opinion was rendered.

[16]It should be noted that the court in *Illinois Central* did not make an incidental finding that the Cumberland and Shawnee Steam Plants, for which coal transported on the conveyor belt at issue was to be used, were "authorized by the Act," and thus that the coal conveyor shipping operations were proper as a "necessary incident to the power generating operations" of those plants. 445 F.2d at 313.

APPENDIX C
STATUTES

16 U.S.C. § 831.

For the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have been effected from the date of the first meeting of the board. This chapter may be cited as the "Tennessee Valley Authority Act of 1933."

16 U.S.C. § 831c.

Except as otherwise specifically provided in this chapter, the Corporation—

(g) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

* * *

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable to the board, then the Corporation may proceed top exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act,....

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler and Pickwick Landing Dams now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines.

16 U.S.C. § 831k.

In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems.